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In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1782

TERRENCE CREAMER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TERRENCE CREAMER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Terrence Creamer, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Opinion Below

The opinion of the Court of Appeals, not yet reported, is appended to this Petition as Appendix A.[1]

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[1] The judgment originally was affirmed via an "Unpublished Order" per Seventh Circuit Rule 35(b). Upon the government's Motion that it be reported due to importance of the issues involved, (See Rule 35(d)(3)) with which Motion petitioner (in his Response thereto) agreed, the Court of Appeals ordered that said Order be published as an Opinion. (App. C)

We call this to Your Honors' attention to support the instant Petition, insofar as such recognition by the Court of Appeals of the importance of the issues herein demonstrates one of the criteria for granting certiorari per Rule 19.1(b) of the Rules of this Court.

Jurisdiction

The opinion of the Court of Appeals was entered (as an Unpublished Order, per Seventh Circuit Rule 35) on March 29, 1977. Petitioner's Petition for Rehearing and Suggestion for Rehearing in Banc, timely filed, was denied on May 16, 1977, (App. B), at which time, per order of Court, the previously Unpublished Order was filed as an Opinion to be reported. (App. C) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. Was petitioner deprived of due process of law by the manner in which the Court of Appeals resolved each individual Point against him, merely paying lip service to the mandate that the cumulative effect of asserted trial errors must be considered, "not singled out and standing alone, but in relation to all else that happened," per *Kotteakos* v. *United States,* 328 U.S. 750, 764, and misapplying the "harmless error" rule of *Chapman* v. *California,* 386 U.S. 18?

2. Was petitioner deprived of a fair trial by prejudicial prosecutorial conduct, both during redirect examination of its "star" witness, Martin, and in final argument?

   A. Where petitioner's convictions necessarily depended on Martin's testimony, may the prosecutor inform the jury that the government would abrogate the witness' entire plea agreement if the government were not satisfied his testimony was truthful? Does this not place the prosecutor's personal imprimatur behind Martin, and, in the factual context herein, deprive petitioner of a fair trial?

   B. In the said factual context—there being nothing but outwardly innocuous conduct on petitioner's part to "corroborate" the incriminatory testimony of Martin—may misstatements of fact by the prosecutor, uncorrected by the court, be deemed "harmless," where such misstatements may well have influenced the jury's verdict?

3. Was there a fatal variance between the indictment and the proof, where certain counts alleged substantive acts of distribution to named agents, while the proof, at best, showed distribution solely to Martin in each instance? Alternatively, was petitioner deprived of due process of law and is he entitled to a new trial because the jury never was instructed as to his theory of the case in this regard?

4. Was petitioner deprived of a fair trial because the jury was not instructed that he must be acquitted if they believed Martin was acting as an independent contractor rather than as an agent or of joint venturer with petitioner?

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Petitioner, Terrence Creamer, was charged in a four-count indictment (75 CR 839) with having conspired with Lee Martin and others to distribute heroin, in violation of 21 U.S.C. 846 (Count 1), and with three substantive counts of distribution of heroin (Counts 2, 3 and 4) on three distinct dates, in violation of 21 U.S.C. 841(a)(1). While the indictment itself did not specify the person or persons to whom the alleged distributions were made, the government, in its answer to petitioner's Motion for a Bill of Particulars, stated that said distributions were to Agents Johnson and Fanter. A jury found petitioner guilty as charged on all four counts, and the court sentenced him to 15 years in custody on each count, all sentences to run concurrently.

Statement of Facts

Undercover agents Robert Johnson (State) and Robert Fanter (Federal) negotiated with Lee Martin for the purchase of narcotics commencing in October, 1975. One of the sales from Martin to the agents took place on November 5, 1975, when Martin sold them some heroin, which Martin said he obtained from "a Chicago copper." (Tr. 13-19) [2] The agents paid Martin $300.00 for that sample and $100.00 that they owed him from a previous transaction. (Tr. 19) The agents importuned Martin to get them two ounces of heroin at a better price than $2,000.00 per ounce. Martin reported to the agents that he spoke "to the cop" who was firm on the price. (Tr. 20-21) On November 7, 1975, the agents met with Martin at a parking

[2] "Tr." refers to the Transcript of Proceedings at trial, filed as part of the Record on Appeal in No. 76-1480 in the Seventh Circuit.

lot near Halsted and Madison Streets. They negotiated to buy two ounces of white heroin for $4,000.00 from Martin, and they did. (Tr. 24-30)

On November 14, 1975, after negotiations with Martin, the agents concluded a purchase of two ounces of heroin for $4,000.00 from Martin which took place at the Austin YMCA, Central and Race Streets in Chicago. Petitioner was seen in and about the YMCA. (Tr. 33-39)

Another purchase by the agents was concluded on December 5, 1975. Martin sold 18½ ounces of white heroin for $37,000.00, again at the Austin YMCA. Martin told the officers that the police officer's partner, an Asian (defendant Waroon Netisingha) would deliver the heroin at the "Y". Agent Fanter went into the "Y" with $37,000.00, obtained a key to a locker from the Asian and obtained a package therefrom. He gave Netisingha the $37,000.00, but then they exchanged the packages again. Fanter carried the money to the front of the "Y" and Netisingha carried the brown bag containing the heroin, whereupon the arrest of Martin and Netisingha took place. (Tr. 42-48)

Lee Martin pled guilty before the trial, and also pled guilty to another indictment involving sales of heroin, United States v. Americo Scala and Lee Martin, 76 CR 318, before Judge Kirkland. (Tr. 87) There was an agreement with the government and with the trial judges that he was to receive a sentence of six years on both of the indictments. (Tr. 212) He had also violated a five year probation term he had received from District Judge Lynch for his plea of guilty to theft from interstate shipment, but revocation proceedings have not yet been instituted. (Tr. 161)

Martin testified that he had obtained the narcotics he sold to the agents, after negotiating with petitioner. With respect to the transactions on November 7, 14 and December 5, 1975, Martin testified that he told petitioner of the two men whom he knew, each of whom was named "Bob"; that he was in the area of Madison and Halsted Streets negotiating with petitioner on November 7; and he saw petitioner in the YMCA on November 14. With respect to the larger sale on December 5, he testified he told petitioner he was getting $30,000.00, and would pay same to petitioner (Tr. 115), but he was selling to the agents for $37,000.00. (Tr. 43; 114) He also wanted the agents to pay him $5,000.00, above and beyond the $37,000.00. (Tr. 227)

On cross-examination, Martin admitted to told the agents he had a nephew from whom he could get heroin. (Tr. 138) He also had narcotic transactions with Americo Scala, a partner of his in a furniture store. (Tr. 69; 169) He also bought and sold marijuana, (Tr. 144-45), and offered to sell large quantities of amphetamines to the agents. (Tr. 149) Although he denied that he told the agents that if he was out of town his 22 year old son would handle his narcotic business, (Tr. 152), the agents testified he did so tell them. He had another supplier of heroin, one Pat Brophy. (Tr. 157) He would lie to his probation officer and falsify probation reports. (Tr. 162) He was a three-time loser and was not going to the joint for anybody (Tr. 163); and he would do anything to stay out of the penitentiary. (Tr. 162; 163)

He did have legitimate transactions with petitioner in the Madison-Halsted Street area wherein he sold petitioner a leather jacket, (Tr. 190), and petitioner also took him to a candy wholesaler in the Madison-Halsted area where he purchased some candy. (Tr. 112)

Although he did not profit on the transactions of November 7 and 14, (and even lost money on the transaction of November 5), (Tr. 180-81), in connection with the 19-ounce transaction on December 5, 1975, he sought to make $12,000.00; $7,000.00 by buying from petitioner for $30,-000.00 and selling to the agents for $37,000.00 (Tr. 226), and by getting an additional $5,000.00 from the agents. (Tr. 227)

He had a source of supply of heroin from his friend Pat Brophy. (Tr. 167)

With respect to his partner, Scala, Martin did not want Scala to know what he was doing with the two Bobs. He was merely partners with Scale on brown heroin, not on white. (Tr. 172) He knew a lot of people who dealt in drugs and narcotics, more than ten, but did not know their names. While he was in custody, he wrote a letter to the United States Attorney in March, 1976 offering to reveal many people who were dealing in drugs if he could get out on probation. (Tr. 174) He would not give their names; only where they lived. (Tr. 174) He told the undercover agent that he was stealing ten loads of merchandise from a K-Mart store a week, (Tr. 56), although he denied he had so stated. He even had narcotics that he bought analyzed. (Tr. 181) In addition to his dealing in marijuana, amphetamines, and narcotics, he sold merchandise such as shoes, clothing, jackets, dresses, "everything." (Tr. 185) However, he never reported any such commercial activities on his probation reports. (Tr. 187)

Agent Robert Johnson, called as a defense witness, testified that some time in October, 1975, Martin sold him and Agent Fanter two ounces of brown heroin for $1,400.00;

and there was another small transaction before that purchase. On October 23, 1975, Martin sold them an additional two ounces of brown heroin for $2,200.00. (Tr. 388) Martin told the agents that he beat a possible 60 years in jail and received five years' probation. (Tr. 389) Martin also told him that he had been taking ten loads of merchandise a week from a K-Mart Store. (Tr. 389-90) Martin also told him that his nephew had some "China white" to sell for $1,500.00 an ounce. China white meant white heroin originating from the China area. (Tr. 390) Also, that his son could handle narcotic deals while he was out of town. (Tr. 391) Also, that he was a 3-time loser and was not going to the joint for anybody. (Tr. 391) Martin also told them that he had some brown heroin for sale that he bought from a party in Indiana for $1,000.00 an ounce. (Tr. 394)

Additional specific, separate facts pertinent to the arguments which follow are included within the respective Points.[3]

[3] In particular:

Facts relevant to Point 1 are at pp. 9-12, *infra;* to Point 2(A), at pp. 12-21, *infra;* to Point 2(B), at pp. 21-24, *infra;* to Point 3, at pp. 24-27, *infra;* and to Point 4, at pp. 27-32, *infra.*

REASONS FOR GRANTING THE WRIT

1.

Petitioner was deprived of due process of law by the manner in which the Court of Appeals resolved each individual Point against him, merely paying lip service to the mandate that the cumulative effect of asserted trial errors must be considered, "not singled out and standing alone, but in relation to all else that happened," per Kotteakos v. United States, 328 U.S. 750, 764, and misapplying the "harmless error" rule of Chapman v. California, 386 U.S. 18.

Calling white, black, does not make it so.

In its efforts to justify affirmance, the Seventh Circuit pays lip service to the requirement that the cumulative effect of claimed errors be considered, (see App. A2, footnote 2); however, by its *seriatim* approach and its refusal to contemplate the real consequences of the necessary dependence of petitioner's convictions upon Martin's testimony, the court has evaded the true issue: that is, whether, considering the convictions in this light, the cumulative effect of the errors complained of deprived petitioner of a fair trial.

Central to this petition is the concept that but for the testimony of Lee Martin, the government could not have made out even a prima facie case against petitioner on any Count.

Hard evidence of petitioner's alleged involvement exists only in the testimony of Lee Martin. While surveillance by state and federal agents corroborates that Martin met with petitioner from time to time, only from the mouth of Martin is petitioner damned.[4]

There is no evidence whatsoever to corroborate Martin's testimony as the contents of his alleged conversations with petitioner; and it is only in Martin's testimony concerning such alleged conversations that any hint of petitioner's supposed involvement in narcotics arises.[5]

Martin's credibility was virtually nil from the outset. An admitted liar and thief, (Tr. 53; 56; 156), he would not do time for anyone, (Tr. 163), would brag about already having cheated the government out of "time," (Tr. 56), had drug sources in abundance other than his alleged connection with petitioner, (Tr. 51; 71; 75; 138; 144-45; 149;

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[4] Reliance upon petitioner's outwardly innocent conduct to corroborate Martin's testimony incriminating petitioner appears to violate this Court's pronouncement that such conduct may not be viewed as illicit merely because of the gloss placed thereon by virtue of an informer's tip. *Sibron* v. *New York*, 392 U.S. 40, 62; see *DeAngelo* v. *Yeager*, 490 F.2d 1012 (3 Cir. 1973).

[5] As to Martin's "credibility" *re* his "drug source": While the "part-time 'under cover agent'" in *United States* v. *Harding*, 525 F.2d 84, 86 (7 Cir. 1975), because of his undercover character . . . *could* have had access to other sources" of narcotics, *id.* at 87 n.6 (emphasis added; conviction reversed), Martin, at bar, *admittedly* had other drug sources. See Tr. 51, 71, 75, 138, 144-45, 149, 157, 167-69. And he so told Agent Johnson. See Tr. 390, 394. In *Harding*, as at bar, "there was no evidence except for . . . [the witness'] testimony that the substance was obtained from [defendant]." *Id.* at 87 n.5.

157; 167-68), and had reason to protect his own friends and relatives. (Tr. 138; 390; 393) [6]

From the foregoing, it is clear that the issues raised herein cannot properly be resolved without viewing the alleged errors in the context that petitioner's convictions necessarily depend upon Martin's testimony. Yet the Seventh Circuit has decided those issues upon the essentially erroneous assumption that sufficient evidence exists apart from Martin to sustain conviction.[7]

The Opinion as a whole reveals that the required cumulative approach to determining the effects of the claimed errors upon the fairness of petitioner's trial was not followed. *Kotteakos* v. *United States*, 328 U.S. 750; 763-65 (1946); *United States* v. *Harding*, 525 F.2d 84, 91 (7 Cir. 1975).

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[6] Additional specific facts regarding Martin's "credibility" are set forth at p. 6, *supra*. And although Martin's phone conversations, both with agents, and, (according to Martin), with petitioner, were, for the most part, conducted over a telephone at Bubba's Tavern, no effort whatsoever was made by the authorities to record any of these conversations, although applicable federal and State law could easily have so permitted. This lack of available corroboration of inherently high quality, (see *United States* v. *White*, 401 U.S. 745, 753) detracts substantially from the government's already extremely weak case against petitioner.

[7] Perhaps one explanation for the Seventh Circuit's extravagant evaluation of the evidence aside from Martin is that it has misread the evidence; for while the Opinion states, "Creamer then told the agents that $40,000 would buy 20 ounces of heroin," (App. A. 5), *nowhere* in the Transcript of Proceedings is there any support for this serious misstatement of the facts. Only Martin dealt with the agents. Since Creamer himself never had any direct contact with any agents prior to his arrest, this plain misstatement of facts by the Court of Appeals is demonstrative of the lack of factual, evidentiary basis for the legal conclusions in the Opinion.

Certiorari should be allowed so that petitioners convictions may be evaluated from a fair trial-due process standpoint, in the manner required by this Court and by the Constitution. *Chapman* v. *California,* 386 U.S. 18, 24 (1967).

2.

Petitioner was deprived of a fair trial by prejudicial prosecutorial conduct, both during redirect examination of its "star" witness, Martin, and in final argument:

A. Where petitioner's convictions necessarily depended on Martin's testimony, and the prosecutor informed the jury that the government would abrogate its plea agreement with the witness if the government were not satisfied that his testimony was truthful, this places the prosecutor's personal imprimatur behind Martin, and, in the factual context herein, deprives petitioner of a fair trial.

B. In the said factual context—there being nothing but outwardly innocuous conduct on petitioner's part to "corroborate" the incriminatory testimony of Martin—misstatements of fact by the prosecutor, uncorrected by the court, may not be deemed "harmless," where such misstatements may well have influenced the jury's verdict.

Prefatory Remarks

The Court of Appeals viewed petitioner's substantial claim of prejudicial prosecutorial conduct through blinders, refusing to contemplate the probable effect thereof upon the lay members of the jury.

Although in its Opinion the court purports to perceive sufficient evidence, aside from the testimony of Lee Martin, self-styled self-saver, to support the convictions herein, (App. A8),[8] it is safe to assume that the jury did not convict without crediting Martin. The detailed evidence in the Opinion (App. A. 4-5) overwhelmingly demonstrates that it was Martin's testimony that damned defendant. (And even the court, albeit grudgingly, so stated. See App. A. 9, fn. 5.)

The Court's effort to soft-pedal the impact of Martin's testimony upon the jury smacks of ostrich-tactics; only by refusing to look can they not see that without Martin, there was no case against petitioner.

And the ostrich buried its head in sand which reached over its ears as well; for the Court likewise refused to listen to what the jury must have heard when the prosecutor put his personal imprimatur behind Martin, and when he misstated the evidence. (See pp. 17-20, *infra*).

A. Vouching for Martin's Credibility.

The government absolutely needed the testimony of Lee Martin to support its case against petitioner. Without Martin, simply, the government had no case.[9]

Defense counsel cross-examined this crucial government witness concerning his plea agreements with the government. Martin had already pled guilty to four counts of the instant indictment, No. 75 CR 839. At the time he began his testimony, Martin was charged as a defendant in

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[8] "[T]he extensive surveillance and the overwhelming circumstantial evidence *could* support the conviction without Martin's direct testimony." (App. 8; emphasis added.)

[9] See p. 6, *supra.*

two separate indictments: the instant one before Judge McMillen, and another, No. 76 CR 318, before Judge Kirkland. Prior to giving his testimony in the case at bar, Martin pled guilty before Judge Kirkland to three counts, pursuant to a plea agreement expressed on the record in his presence and concurred in by the Asst. U.S. Attorney, (Ind. No. 76-CR 318, Tr. of 3/26/76, pp. 4-5): that he would receive a 6-year concurrent sentence from each judge. (Ind. No. 76-CR 318; Tr. of 3/26/76, pp. 4-5).

And on the morning of the day trial was set to commence in the case at bar, March 29, 1976, before Judge McMillen, Martin changed his plea to guilty on four counts, pursuant to the agreement with the government, concluded in Martin's presence, that Judge McMillen would sentence him to 6 years. (Tr. of 3/29/76). It was also made clear that part of the plea agreement in the case at bar was that Martin testify for the government against petitioner. (*Id.*, pp. 7-8)

In addition to demonstrating that Martin had pleaded guilty to a total of 7 counts for which he could receive a grand total of 105 years and fines totalling $175,000, and had been promised a total of only 6 years imprisonment upon the two indictments, petitioner further elicited that Martin was then on probation to yet another federal judge, upon a 5 year probation term imposed some two years earlier. (Tr. 161) There was as yet (apparently) no agreement concerning the disposition of any possible charge that Martin had violated that probation by virtue of his having pleaded guilty in the instant cause and in the cause before Judge Kirkland.

Defense cross-examination also disclosed that before Martin knew that the buyers were government agents, he had told them that he (Martin) had "conned" the government out of 60 years, and got 5 years probation. (Tr. 56)

It was also shown that Martin lied to his Probation Officer. (Tr. 53)

Even the trial court stated Martin was not wholly truthful in all his testimony.[10]

Faced with this cross-examination of its witness Martin as to his bias and prejudice and reasons for testifying falsely against petitioner for his own benefit, government counsel must have felt constrained to attempt to rehabilitate its witness; to try to restore in the jury's collective mind some semblance of confidence in Martin's credibility. But the avenues used by the government and permitted by the court were so improper as to amount to effective denial of petitioner's constitutional rights to confrontation and cross-examination, and to a fair trial.

To try to convince the jurors that they should nonetheless believe Martin so as to convict petitioner, despite the cross-examination revealing the matters as set forth above, the government launched a two-pronged attack:

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[10] At Martin's sentencing by Judge McMillen, Mr. Semmer, the Asst. U.S. Atty., asked the court to execute the plea agreements because, "This was based on Martin's full cooperation which your Honor saw during the course of the trial"; to which the judge responded:

> "I will disagree with you to this extent, Mr. Semmer, that I do not think his cooperation was complete when he was on the stand. I can't imagine that the defendant didn't remember more than he purported to. But as far as what he did say affirmatively, I think it was complete.
>
> Maybe he had pretty good reasons for not remembering. It did not seem to affect the outcome of the case. No one can forget things as fast as Mr. Martin apparently forgot them when he was asked questions by the defendant's attorney." (Tr. of Martin's Sentencing, 4/13/76, p. 3.)

(1) *On Redirect Examination.*

Martin was permitted to answer the prosecutor's question, in front of the jury, that it was part of the plea agreement that before the government will make the sentencing recommendations per the agreement, Martin must testify truthfully in order to obtain the benefits anticipated from that "deal," and further, that if Martin did not testify truthfully, he would be subject to prosecution for perjury. (Tr. 230-33)

Clearly, *any* witness who testifies in such a manner as to make the government believe his material testimony is not "truthful" is subject to prosecution for perjury.

The information contained in the government's question was highly prejudicial because, clearly, it conveyed that the prosecutor was in a position personally to know whether or not Martin's testimony was truthful; else how could the government's agreement to abide by its sentencing recommendation be conditioned upon the "truth" of Martin's testimony?

This information was further prejudicial because, by natural inference it must have led the jury to believe that witness Martin would be *less* likely to lie under oath than an "ordinary" witness with whom the government had not made any plea agreement.[11]

The vice is that it conveyed that the prosecutor believed that Martin was telling the truth. In effect, he was telling the jury to believe Martin because he, the prosecutor, believed him; after all, Martin would be prosecuted for

[11] In this respect, it was prejudicial because the jury never was advised of the converse; that is, that the sanction of prosecution for prejury is available against *any* witness who might give false material testimony, whether or not there is also a plea agreement. See *United States* v. *Reid*, 410 F.2d 1223, 1227-28 (7 Cir. 1969).

perjury, and the "deal" would be abrogated, if the government did *not* believe his testimony was truthful. See cases and argument, p. 16, *infra*.

(2) *In Final Argument.*

Aggravating the error that already infected the record as set forth above, the prosecutor argued to the jury that Martin must be telling the truth; because this Judge will send him off for perjury unless his testimony was the truth; and there is no plea agreement with Martin unless he tells the truth. (Tr. 468-69) [12]

By this argument, as by the improper re-direct, the prosecutor in effect told the jury: *We, the prosecution, are satisfied that Martin told you the truth when he implicated petitioner.* This was no different from telling the jury that the prosecutor personally believed that Martin was testifying truthfully.

Also implicit is that the government would not knowingly use perjured testimony; the objectionable argument amounts to the prosecutor telling the jury that by presenting Martin at all, he, the prosecutor, believes him to be giving truthful testimony. The whole issue of "perjured testimony" clouded the real issues and prejudiced petitioner's right to a fair trial.

Clearly government counsel may not tell the jury, as he did here, that a witness was telling the truth. In context, the prosecutor's statement was not an argument based upon the evidence; counsel's statement herein, put as a matter of fact, necessarily meant that government counsel believed the witness, thus putting his (counsel's) *own* credibility in issue. This argument is indisputably improper and constitutes grounds for reversal. *United States* v.

[12] The prosecutor to the jury: "He [Martin] would be an absolute utter fool to lie before the very Judge who is going to sentence him in this case."

Wasko, 473 F.2d 1282, 1283-84 (7 Cir. 1973); *United States* v. *Handman,* 447 F.2d 853, 856 (7 Cir. 1971); *United States* v. *Lamerson,* 457 F.2d 371, 372 (5 Cir. 1972); *Hall* v. *United States,* 419 F.2d 582, 586 (5 Cir. 1969); *Greenberg* v. *United States,* 280 F.2d 472, 474-75 (5 Cir. 1960).

In *Handman, supra,* the Court noted: "The question is not whether the prosecutor meant 'to insinuate' that his statement was based on personal knowledge. *The question is what the jury probably thought.*" 447 F.2d at 856. (Emphasis added.) See also *United States* v. *Busse,* 2 Cir. 531 F.2d 1151, 1155.

In language peculiarly significant to the factual situation at bar, the Court continued:

> "And the cross-examination by Handman's attorney to discredit . . . [the witness] does not justify the prosecutor's replying by improper argument." *Ibid.*

Keeping in mind the necessarily great confidence the jury has in the government representative—the prosecutor, see *Berger* v. *United States,* 295 U.S. 78, 88 (1935)—consider the following holding:

> " 'To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that government counsel is . . . an advocate is the very reason why he should not impinge upon this quasi-judicial function'." *Hall* v. *United States,* 419 F.2d 582, 586 (5 Cir. 1969), reversing, quoting from *Greenberg* v. *United States,* 280 F.2d 472, 475 (5 Cir. 1960). (Emphasis added; footnote omitted.)

Accord, United States v. *Wasko, supra.*

The impact of closing argument by the government must be considered, not only as to itself, but also in context with the entire trial. See *United States* v. *Harding,* 525 F.2d 84, 91 (7 Cir. 1975).

And most importantly, where the prejudicial nature of the prosecutorial misconduct is so blatant and harmful, in context, as here, reversal must follow, for the prejudice is incapable of being eradicated at the trial level. *United States* v. *Fearns,* 501 F.2d 486, 488-89 (7 Cir. 1974).

Because the prosecutor's improper re-direct of Martin and his impermissible argument regarding Martin's credibility in effect precluded the jury from drawing those inferences favorable to the defense concerning Martin's credibility that otherwise properly could have been drawn, based upon the matters adduced upon cross-examination, such prosecutorial conduct deprived petitioner of his due process right to a fair trial. Moreover, such conduct infringed upon defendant's Sixth Amendment right of confrontation and cross-examination.

The Seventh Circuit's attempts to convert the prosecutor's conduct—which conveyed directly to the jury that if the government were not satisfied that Martin's testimony was truthful, they, the government, would abrogate martin's entire plea agreement [13]—into something innocuous, overlooks simple principles of human nature [14] relative to

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[13] This comment, conveying that the plea agreement would be abrogated should the government disbelieve Martin, materially distinguishes the instant case from those somewhat similar cases relied on by the panel. (App. 10), wherein no such total abrogation of the plea agreement was to occur merely upon the government's disbelief of the witness in question.

[14] *Cf. People* v. *Garner,* 19 Ill.App.3d 728, 312 N.E.2d 678, 682 (1 Dist. 1974), for judicial recognition of human nature.

the jury's probable perception of prosecutorial "pearls."[15]

Without a doubt, the prosecutorial conduct herein complained of amounted to telling the jury that the prosecutor believed Martin was telling the truth; that despite all the unsavory aspects of the witness which were revealed to the jury, (see App. 9, fn. 5), he, the prosecutor, was presenting Martin's testimony as he, the prosecutor, believed it.

The total thrust of the prosecutor's statements can mean no less.

Coupled with the other errors asserted to have impaired the fairness of petitioner's trial, the prosecutor's improper bolstering of Martin's credibility, which placed his personal and professional assurance behind such testimony, operated to deprive petitioner of that fair trial to which he is constitutionally entitled.[16]

Certiorari should therefore be allowed.

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[15] The Opinion below overlooks (or refuses to see) that the question is not whether the prosecutor overtly stated that he held a personal belief in Martin's credibility, or even whether he meant to insinuate that such belief was based upon extra-record knowledge: "The question is what the jury probably thought." *United States* v. *Handman,* 447 F.2d 853, 856 (7 Cir. 1971).

[16] Especially in view of the extremely jaundiced eye with which juries necessarily view defendants charged with distribution of narcotics, see *United States* v. *Clemons,* 503 F.2d 486, 491 (8 Cir. 1974), the conduct herein complained of cannot be deemed "harmless." *Ibid.;* see *United States* v. *Freeman,* 514 F.2d 1314 (D.C. Cir. 1975); *United States* v. *Smith,* 500 F.2d 293 (6 Cir. 1974); *United States* v. *Davis,* 532 F.2d 22 (7 Cir. 1976); *United States* v. *Fearns,* 501 F.2d 486 (7 Cir. 1974).

In *Freeman, supra,* the Court (in reversing) opined:

> "[T]he custom of courts in responding to instances of courtroom misconduct by prosecutors has been to issue a verbal reprimand and affirm under the harmless error rule. Despite these

(footnote continued)

b. Prosecutorial Factual Misstatements

The dismissal as "harmless" of conceded error in the prosecutor's summation by the Court of Appeals, where the case is close, is in conflict with this Court's teaching in *Berger (Berger* v. *United States,* 295 U.S. 78, 88-9) that serious doubts on jury impact should be resolved in favor of the defendant.

In final argument, the prosecutor stated that if defense counsel was so concerned about what happened between Martin and defendant, he (defense counsel) should have asked on cross-examination what was said between Martin and defendant in their meeting at the YMCA. (Tr. 469) Upon defense counsel's objection that there was no evidence of any conversations between them at the YMCA, the court merely stated that the jury would recall the evidence. (Tr. 469)

In fact, there was no evidence of any conversation between Martin and defendant at the YMCA.

The full pertinent evidence was as follows: when Martin testified he *saw* Creamer at the "Y", the prosecutor asked:

"Did you have a conversation with him down there?"; to which Martin answered, "No." (Tr. 109)

(footnote continued)

> verbal slaps-on-the-wrist, prosecutorial misconduct continues to provide 'one of the most frequent contentions of defendants on appeal.' Our experience thus suggests that *courts must begin to take prophylactic considerations together with probable prejudice to defendant in deciding whether to reverse.*" 514 F.2d at 1321. (Footnotes omitted, emphasis added.)

The Court of Appeals, in recognizing the error, but discarding it as harmless, demonstrates how aggravated was the situation:

> "Cramer maintains that the court should have corrected the erroneous statement of the prosecutor. The Government fairly characterizes the context of the interchange as follows (Gov't Br. at 15 n. 24):
>
> > 'The prosecutor misstated the evidence when he spoke of a conversation inside the 'Y.' Defense counsel objected, asserting Martin never testified he *saw or* talked to Creamer inside the 'Y.' The record however, reflects that Martin testified he met creamer in the 'Y' on the day of the second to ounce sale. (Tr. 109). Furthermore, Agent Johnson testified he saw Creamer near the locker room area at the time of the 18½ ounce sale. (Tr. 47). *The prosecutor, in response to defense counsel's misstatement stated that there was testimony to support him.*'
>
> "To require the trial judge to resolve for the jury what the evidence actually was would have been more confusing than illuminating." (App. A, p. 10, fn. 6. Our emphasis)

Where, as here, the jury's final decision necessarily rested upon their determination as to Martin's credibility, any misstatement of fact by the prosecutor is grounds for reversal.

In *Jones* v. *United States,* 338 F.2d 553 (D.C. Cir. 1964), misstatements of evidence by the prosecutor were deemed grounds for reversal where the government's case was "paper thin," *even though the trial court had instructed the jury to disregard the misstatements.* "The relative strength of the evidence against the defendant is a material factor in weighing whether trial errors require reversal." *Cross* v. *United States,* 353 F.2d 454, 456 (D.C. Cir. 1965).

In *Corley* v. *United States,* 365 F.2d 884 (D.C. Cir. 1966), where, in closing argument, the prosecutor had misstated certain alibi testimony, the Court reversed, holding: "*But* for the prosecutor's misstatements, the jury might well have found that the alibi testimony created a reasonable doubt." *Id.* at 885.

In *King* v. *United States,* 372 F.2d 383 (D.C. Cir. 1967), the prosecutor misstated psychiatric and psychological testimony in such a way as to inform the jury—contrary to the evidence—that defendant had no organic brain damage; the Court of Appeals reversed. Whether the misstatement was deliberate or not was deemed irrelevant. *Id.* at 395. Upon defense objection to the misstatements, the trial court—as at bar—advised the jury to rely solely on their recollection of the evidence *Id.* at 395-96. The reviewing court held:

> "Where the case is close, prejudice cannot be avoided by 'mild judicial action,' and reversal is necessary to obviate the consequences of [the misstatement.]" *Id.* at 396.

The essential consideration of this being a close case, dependent only on the one witness, Martin, appears not to have been accorded. This may be accounted for by the Court's misunderstanding of the evidence. See fn. 4 and 7 *supra.* Many years ago, this Court cautioned that, in close cases improper remarks by the prosecutor may carry "much weight against the accused when they should carry none." *Berger* v. *United States,* 295 U.S. 78, 88.

In the posture of the case, where the informer is absolutely not corroborated on any focal point, where all of the evidence relies on the informer and where a surveillance merely showed Creamer in and about the YMCA, a public place, at the critical times, the denomination of this ad-

mitted error as harmless is disconsonant with that same Court's decision in *United States* v. *Harding,* 525 F.2d 84, where it recognized the "critical importance" of even slight deviations where witnesses are uncorroborated. "Due process does not require perfect trials but it mandates fair ones." *United States* v. *Love,* 6 Cir., 534 F.2d 87, 89.

For the prosecutorial misconduct asserted herein—both with respect to the improper bolstering of Martin's credibility by improper conduct during examination of Martin and in argument, and in the misstatement of fact in argument—petitioner should be afforded a new trial. The jury which convicted him was improperly swayed by the calculated actions of the prosecution, which utilized both subtle and obvious methods of persuasion forbidden by longstanding and controlling legal principles. In the context of a trial at which Martin's credibilty was crucial, petitioner was deprived of due process. He must receive a new, constitutionally fair trial. Certiorari should be allowed.

3.

There was a fatal variance between the indictment and the proof, where certain counts alleged substantive acts of distribution to named agents, while the proof, at best, showed distribution solely to Martin in each instance. Alternatively, petitioner was deprived of due process of law and is entitled to a new trial because the jury never was instructed as to his theory of the case in this regard.

The indictment alleged in each of Counts 2, 3 and 4 that petitioner distributed a given quantity of heroin, a controlled substance, on a given date. (A. 1) [17] By its answer

[17] "A." refers to petitioner's Appendix to his Brief filed in No. 76-1480 in the Seventh Circuit.

to petitioner's Motion for a Bill of Particulars, the government asserted that the said alleged distributions were made to Agents Johnson and Fanter. (Ag. 6)

The evidence demonstrated that if petitioner distributed to anyone, it was not to Agent Johnson and Fanter; it was only to Martin. (See Statement of Facts, p. 6 *supra.*)

The government is bound by its Bill of Particulars; in other words, once the government answered therein that the alleged distributions were to Johnson and Fanter, proof of such distributions became absolutely essential to establish petitioner's guilt upon Counts 2, 3 and 4. *United States* v. *Neff,* 212 F.2d 297, 309 (3 Cir. 1954).

If petitioner distributed to someone other than Johnson and Fanter, then he is not guilty of the offenses charged in those Counts. *United States* v. *Raysor,* 294 F.2d 563, 566-67 (3 Cir. 1961).[18]

[18] In *Raysor, supra,* defendants were charged with sale to a single individual, Agent Dillworth, on two occasions. However—as at bar—the evidence showed, (if anything), as to each count, a sale to another individual, one Thomas Charity. *Id.* at 564-65. The facts there were strikingly similar to those pertaining to Counts 2, 3 and 4 herein; for in *Raysor,* as here, the sale actually was to the third party, obviously on behalf of the person to whom defendant was charged with having made the sale, per the government's allegations. Under such circumstances, the Court held that there was a fatal variance between the indictment and the proof:

> "Where there is a variance between the indictment and the proof with respect to the person named in the indictment as the buyer of the contraband, such a variance is fatal and a conviction cannot be permitted to stand." *Id.* at 566.

In reaching this conclusion, the Court relied upon *Berry* v. *State,* 111 Tex. Crim. 281, 12 S.W.2d 581, and upon language from *United*

(footnote continued)

According to the *Raysor* Court and the authorities upon which it relies, where an indictment charge sale to a given individual, and the evidence establishes sale to a different individual, there is a fatal variance requiring reversal.

Raysor has been reaffirmed in the Third Circuit, *United States* v. *Marakar,* 300 F.2d 513, 515 n.4 (3 Cir. 1962), and, by implication, has been recognized as the law in the Seventh Circuit. *United States* v. *Lawler,* 413 F.2d 622, 626 (7 Cir. 1969).

The trial court openly disagreed with the *Raysor* holding, *acknowledging it, but refusing to follow it.* (Tr. 441)

The Seventh Circuit's reliance upon *United States* v. *Shennault,* 429 F.2d 852 (7 Cir. 1970), to avoid the otherwise dispositive impact in petitioner's favor of *United States* v. *Raysor,* 294 F.2d 563, 566-67 (3 Cir. 1961), is misplaced. (See App. 2-3.) In *Shennault* the indictment (as here) failed to allege the person to whom the defendant allegedly sold narcotics; *however, there—unlike here—there was no specification via bill of particulars of the said distributee.*

(footnote continued)

States v. *Bach,* 151 F.2d 177, 179 (7 Cir. 1945). *Ibid.* The Court also quoted from and relied upon *Berger* v. *United States,* 295 U.S. 78, 82 (1935) (294 F.2d at 566-57), and *Stirone* v. *United States,* 361 U.S. 212, 217-18 (1960) (294 F.2d at 567).

See also *People* v. *Sullivan,* 23 Ill.2d 582, 179 N.E.2d 634 (1962) (sale of narcotics; indictment charged sale to A, evidence demonstrated sale to B; conviction reversed); *cf. People* v. *Davis,* 13 Ill. 2d 211, 148 N.E.2d 771 (1958) (charge of sale to minor; evidence showed sale to third party, not the minor alleged; conviction reversed).

The panel's blunt acceptance of the government's joint venture theory to avoid the *Raysor's* edge operates to deprive petitioner of the benefit of that constitutionally mandated decision. Certiorari should be allowed to resolve this conflict between the Third and Seventh Circuits.

And even if the asserted variance somehow does not require that the convictions be overturned, still petitioner is entitled to a new trial because the jury never was instructed as to the alternative possible sets of facts; that is, that petitioner should be acquitted *unless* the facts show, as to each Count, that *he distributed to Agents Johnson and Fanter.*

While the court does give consideration to another asserted absence of a required jury instruction, (see App. 6-7), *re* the "independent contractor theory," it apparently overlooked this important aspect of petitioner's appeal; for nowhere in its Opinion does the Court direct itself to the absence of any instruction requiring the jury to find distribution in accordance with the specifications of the Bill of Particulars. In view of the continuing importance of "theory of the case" instructions as a due process requirement, see *United States* v. *Vole,* 435 F.2d 774, 778 (7 Cir. 1970),[19] certiorari should be allowed, if for no other reason than to decide this substantial issue.

4.

Petitioner was deprived of a fair trial because the jury was not instructed that he must be acquitted if they believed Martin was acting as an independent contractor rather than as an agent of or joint venturer with petitioner.

Aside from his general attack on Martin's credibility, upon the theory that he was lying about petitioner's in-

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[19] See also cases and argument in Point 4, pp. 27-32, *infra.*

volvement in order to save his own skin and that of friends and relatives, petitioner's principal theory of defense was that Martin was acting as an independent contractor, purchasing contraband from petitioner (if Martin be believed). As such, he could not conspire with petitioner, so there could be no conspiracy as alleged in Count 1;[20] concomitantly, petitioner could not be charged in law with responsibility for Martin's acts with respect to the purchases, agents Johnson and Fanter. Therefore, a sale to Martin by petitioner was *not* a sale by petitioner to the agents, essential to conviction on Counts 2, 3 and 4. (See Point 3.)

Under the government's answer to the Bill of Particulars, the proof had to show distribution *to the agents* by petitioner, not to Martin, in order to prove the substantive offenses charged in Counts 2, 3 and 4. (App. 6)

In the face of this posture of the evidence, it was essential that the jury be permitted to consider the factual alternatives. Clearly, the evidence supported the inference upon which petitioner's hope for acquittal on all counts depended.

But the jury was never given that choice.[21]

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[20] The relationship of buyer and seller—as between Martin and petitioner herein—without more, is insufficient to make out a conspiracy to sell drugs. *United States* v. *Braico*, 422 F.2d 543, 544 (7 Cir. 1970); *United States* v. *Varelli*, 407 F.2d 735, 748 (7 Cir. 1969); *United States* v. *Ford*, 324 F.2d 950 (7 Cir. 1963); *United States* v. *Zeuli*, 137 F.2d 845 (2 Cir. 1943).

[21] It is essential to keep in mind that, even if appellate judges believe that the evidence was sufficient to sustain a conviction, this must not interfere with their determination concerning the propriety of the charge to the jury; to act otherwise, as has been noted by

(footnote continued)

Petitioner was deprived of his opportunity for acquittal upon the jury's determination of the facts; for even if they believed the facts to be as necessary to support petitioner's theory—that is, that petitioner and Martin were seller and buyer to one another rather than conspirators or in any agency relationship—they were not told that such facts would require acquittal. A defense instruction which would have given them this option was refused. (Tr. 431-33)

(footnote continued)

this Court, would be tantamount to interposing the appellate judges' belief in the defendant's guilt in place of the jury's verdict, in derogation of defendant's constitutional right to trial by jury:

> "In view of the Government's insistence that there is abundant evidence to indicate that . . . [defendant was guilty], it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials. . . .
>
> ". . . All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. . . . From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946). (Frankfurter, J., for the Court.)

These concepts should guide this Court in considering this aspect of the cause.

A defendant has a due process right to present his theory of the case to the jury. *Holt* v. *Virginia,* 381 U.S. 131, 136 (1965); see *Washington* v. *Texas,* 388 U.S. 14 (1967); *Chambers* v. *Mississippi,* 410 U.S. 284 (1973). Where a defendant presents a theory—as here—supported by any evidence, he has a constitutional right to have the jury instructed on that theory. *United States* v. *Grimes,* 413 F.2d 1376 (7 Cir. 1969); *Levine* v. *United States,* 261 F.2d 747 (D.C. Cir. 1958); *United States* v. *Phillips,* 217 F.2d 435 (7 Cir. 1955). Here, there was ample evidence supporting petitioner's theory that Martin was an independent contractor, purchasing from petitioner for his own purpose. (Tr. 43, 114-15, 227)

The Seventh Circuit incorrectly assumed, for purposes of its Opinion and in a manner which, we submit, necessarily colored its decision of this issue, that "defendant concedes the evidence supports a conspiracy . . ." (App. 6, citing our Reply Brief, p. 7.) However, what we there "conceded" was:

> "While (arguably) there may have been sufficient evidence from which the jury could have found that the relationship between defendant and Martin was more than merely that of seller and buyer, [citing G. Br. pp. 2-22], there also was sufficient evidence from which they could have found that Martin was on a fling of his own . . ." (Def. R. Br. p. 7)

That the reviewing court thus has misinterpreted our position demonstrates how important it is that certiorari be allowed; for while an appeal may be "lost", an adverse result should not ensue upon such convoluted cerebrations.

Similarly, can this Court abide an Opinion which relies upon defense counsel's failure to have argued to the jury

the theory upon which sought-for instructions were refused, (App. A. 7, fn. 3), pretending we did not state in our Reply Brief:

> "That defense counsel did not so argue to the jury [citing G. Br. p. 27, fn. 47] does not cut against our position herein. Argument of counsel unsupported by instructions giving the force of law thereto can be more harmful than no argument on the subject at all. *United States* v. *Phillips,* 217 F.2d 435, 440 (7 Cir. 1955)." (Def. R. Br. p. 10)

It is beyond peradventure that arguments *must* be within the legal theories to be covered by the Court's instructions. *United States* v. *Companion,* 9 Cir., 508 F.2d 1021, 1022; *United States* v. *Bohle,* 7 Cir., 445 F.2d 54, 69-71; *Graham* v. *United States,* 6 Cir., 257 F.2d 724, 729; *Evans* v. *United States,* CADC, 232 F.2d 379. It is incomprehensible that an inference of concession can be attributed to petitioner because his counsel heeded this established truism.

While there may not have been any direct testimony—though we consider that the evidence itself substantiates it; see Tr. 43, 114-15, 227—that Martin was an independent contractor, purchasing from petitioner for his (Martin's) own purposes, (see App. A. 6-7), surely from such evidence the jury properly could *infer* that such was their relationship, rather than that of co-conspirators or even joint venturers. The court's refusal to give the requested independent contractor instruction—which meant the jurors were not told they must acquit if they found that such relationship alone existed[22]—violated the rule that "A trial judge may not impose on a jury his own notion of

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[22] It is reversible error to fail to instruct as to the legal ramifications of various possible factual alternatives. *United States* v. *Forbes,* 515 F.2d 676, 682-84 (D.C. Cir. 1975).

which inferences are reasonable." *United States* v. *DeLoach*, 504 F.2d 185, 190 (D.C. Cir. 1974).[23]

The end result of the court's refusal so to instruct upon request was to deprive defendant of his sole opportunity for acquittal even if the jury chose to believe Martin (as indeed they must have in order to convict, see App. 9, fn. 5, despite the Court of Appeal's gratuitous comment to the contrary). (App. 8; see, fn. 8.) The means by which such end was achieved included deprivation of petitioner's due process right to present his theory of the case to the jury,[24] and, necessarily, his equally strong constitutional right to have counsel argue his theory of the case.[25]

Certiorari should therefore be allowed.

CONCLUSION

For any or all of the foregoing reasons, the Petition for a Writ of Certiorari should be allowed to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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[23] Citing and quoting from 6 WIGMORE, EVIDENCE § 1807(3), at 272 (3d ed. 1940); *accord, United States* v. *Charles Pfizer & Co.*, 426 F.2d 32, 43-45 (2 Cir. 1973).

[24] *Holt* v. *Virginia*, 381 U.S. 131, 136 (1965); *United States* v. *Vole*, 435 F.2d 774, 778 (7 Cir. 1970).

[25] *Herring* v. *New York*, 422 U.S. 853 (1975); *United States* v. *DeLoach, supra; United States* v. *Phillips*, 217 F.2d 435, 440 (7 Cir. 1955).

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued February 7, 1977
(Decided) March 29, 1977

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Philip W. Tone, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 76-1480 vs.

TERRENCE CREAMER,

Defendant-Appellant.

Appeal from the United States District Court, Northern District of Illinois, Eastern Division. No. 75-Cr-839.
Thomas R. McMillen, Judge.

OPINION

In December 1975, the defendant, Terrence Creamer, a Chicago police officer, was indicted along with Waroon Netisingha and Lee Martin on one count of conspiracy to distribute heroin in violation of 21 U.S.C. § 846, and three substantive counts of heroin distribution in violation of 21 U.S.C. § 841(a)(1). Both Netisingha and Martin en-

tered guilty pleas prior to Creamer's trial, but only Martin offered testimony at the trial.[1] After a three-day trial beginning on March 30, 1976, the jury found defendant guilty on all four counts and Creamer received 15-year concurrent sentences on each count. This appeal ensued. We affirm.

Attacks on Evidence as Insufficient in Law

Defendant argues that the evidence was insufficient as a matter of law to support the charges in the indictment.[2] Creamer first maintains that there was a fatal variance between the indictment as supplemented by the Government's answers to his bill of particulars. The three substantive counts alleged distribution to named agents while the proof, as the Government concedes, demonstrated that Creamer had distributed heroin only to Martin.

Historically, the "fatal variance" doctrine arose in order to provide a defendant with notice of the charges against him so that he could intelligently marshall his defense and to protect him against a subsequent prosecution for the same offense. *United States* v. *Cassell,* 452 F. 2d 533, 536 (7th Cir. 1971). Creamer's reliance on *United States* v. *Raysor,* 294 F.2d 563 (3d Cir. 1961) is misplaced. In

[1] Martin pleaded guilty to the charges in the instant indictment and to those in another heroin indictment, *United States* v. *Scala and Martin,* 76 CR 318, before Judge Kirkland. He had also violated a five-year probation received from Judge Lynch for his plea of guilty to theft from interstate shipment. There was an agreement that he was to receive a sentence of six years on both of the indictments. In sum, if the plea agreement evaporated, Martin would have faced a possible maximum sentence of 105 years and a $105,000 fine.

[2] Although we choose to address the sub-branches of defendant's arguments *seriatim,* we are not unmindful of their cumulative effect. *Kotteakos* v. *United States,* 328 U.S. 750, 763-765. We find no *gestalt* that needs to be addressed independently of the individual error assertions.

Raysor, a two-count substantive indictment alleged a narcotics sale to one Dillworth, a federal narcotics agent, although the evidence showed the actual sale was to one Charity, a narcotics addict informer employed by the federal narcotics officer. This "manifestly sloppy" indictment technically did not prevent a subsequent prosecution of the sale to Charity and did not fully apprise the defendants of the charges against them. Here the indictment adequately notified Creamer that the Government would proceed against him on a joint-venture basis. Count I of the indictment, the conspiracy count, explicitly incorporated substantive Counts II-IV as overt acts in furtherance of the conspiracy. Moreover, the Government's answer to defendant's bill of particulars query on who distributed the heroin in Counts II-IV correctly recited that "[u]nder the principles of law, all three defendants distributed the heroin." *United States* v. *Schennault,* 429 U.S. 852, 854 (7th Cir. 1970). Thus defendant received fair notice of the charges against him and faced no double jeopardy risk.

Defendant next challenges the sufficiency of the evidence adduced to support a conspiracy/joint-venturer theory. Taking Martin's testimony as true, defendant argues that Martin was an independent contractor, purchasing drugs from Creamer and disposing of them totally as he pleased without any regard for a joint objective. A simple buyer/seller relationship cannot be transformed into a conspiracy solely on the basis of one transaction. *United States* v. *Braico,* 422 F. 2d 543, 544 (7th Cir. 1970), certiorari denied, 398 U.S. 912. Of course, this conclusion results theoretically from the premise that no agreement to achieve ends beyond the one transaction can be inferred from an isolated sale. But even if Martin and Creamer were buyer and seller, if sufficient evidence exists to prove a concert of

action, a conspiracy will have been made out as a matter of law. *United States* v. *Varelli,* 407 F.2d 735, 748 (7th Cir. 1969).

Taking the testimony in the light most favorable to the Government, as we must, Martin's testimony along with the corroborative surveillance evidence of virtually all of the meetings between this case's cast of characters amply supports the verdict that Creamer, Netisingha and Martin conspired to distribute heroin as joint-venturers. Martin's testimony details a $500 sale of a quarter ounce between Martin and Creamer on November 4, 1975. Part of this heroin lot was cut and sold to an Illinois Bureau of Investigation Special Agent, Robert Johnson, working undercover for the Federal Drug Enforcement Administration. Martin told Johnson and DEA Agent Robert Fanter that his heroin had come from a "Chicago copper [Creamer]."

The agents expressed interest in buying two ounces of heroin from "the cop" and Martin said he would try to arrange it. On November 6, 1975, Martin called Agent Johnson, telling him that Martin had met with "the cop" and that Creamer's $2,000 an ounce price was firm. On November 7, 1975, arrangements were completed and the initial part of the deal was transacted in a parking lot in Chicago. The agents displayed the $4,000 agreed amount to Martin, and he left to check with "Terry" [Creamer] how the deal was to transpire. Martin met with Creamer who suggested a method of exchange of the heroin for the cash. Martin returned to the agents who rejected the plan because it required them to "front" the money. Martin returned to Creamer to ask for modified instructions, and two more plans of exchange, which Martin represented as being put forward by "the cop" or by "Terry," were successively offered to and rejected by the agents. The

fourth plan was acceptable since Martin left his son with the agents as security for their cash. Martin gave the cash to Netisingha in Creamer's presence, received the heroin and delivered it to the agents.

Creamer also met with Martin on November 14, two days after the agents had asked Martin for more heroin. The agents met with Martin at Bubba's Tavern where Creamer called and told Martin to go to a YMCA. Creamer appeared at the YMCA and motioned for Martin to follow him to the locker room. Netisingha arrived with the heroin and Martin gave him $4,000 cash for a package containing 50.65 grams of pure heroin.

On December 4, the agents asked Martin about buying a pound of heroin and flashed a $40,000 roll at him. Martin met with Martin [*sic*] on the same day and discussed a per pound price. Creamer then told the agents that $40,000 would buy 20 ounces of heroin. The next day Martin picked up a sample at Creamer's hot dog stand to show the agents. Later that day, Martin received a call at Bubba's Tavern from Creamer telling him that 18 ounces of heroin would be at the YMCA. Martin and the undercover agents went to the YMCA and Creamer arrived shortly thereafter. Johnson exchanged $37,000 with Netisingha for the heroin in the locker room. Contemporaneously Johnson observed Creamer in the locker room area.

Once outside the YMCA, Martin and Netisingha were arrested, with Creamer being taken into custody shortly thereafter at his hot dog stand. In a search incident to Creamer's arrest, the arresting officer found the paper Martin had previously given Creamer with the phone numbers for Bubba's Tavern and Martin's home. After being advised of his rights, Creamer stated, "I knew something was coming down," and in another conversation Creamer

said, "I don't want to be a bother after what I have done," although he later denied making these statements.

With credibility determinations taken in favor of the Government, the evidence on the existence of a joint venture is overwhelming. Indeed, defendant concedes the evidence supports a conspiracy, claiming in his reply brief only that there was sufficient evidence to find Martin was on a fling of his own (R. Br. 7). We disagree that the evidence could support an independent contractor theory and, in any event, defendant's concession conclusively forecloses a substantial evidence attack. *Glasser* v. *United States,* 315 U.S. 60, 80.

Nevertheless, defendant maintains it was error not to offer an instruction that if the jury found Martin to be an independent contractor, Creamer would have had to be acquitted. A criminal defendant is entitled to have a jury instruction on any defense which provides a legal defense to the charge against him and which has "some foundation in the evidence, 'even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility.'" *United States* v. *Hillsman,* 522 F.2d 454, 459 (7th Cir. 1975). But a jury instruction is only needed if the evidence raises a jury question. *United States* v. *Grimes,* 413 F.2d 1376, 1378 (7th Cir. 1969). And in this context, if it cannot be said that a reasonable person "might conclude" the evidence supports a certain instruction, then the instruction need not go to the jury. Cf. *United States* v. *Feinberg,* 140 F.2d 592, 594 (2d Cir. 1944) (L. Hand, J.), certiorari denied, 322 U.S. 726.

Defendant points to four widely separated pages of the transcript which reveal that although Creamer told Martin the price to the agents for the December 5 purchase would be $30,000, Martin in fact quoted a price of $37,000, in-

tending to keep the extra $7,000 for himself. At best these transcript references show that Martin intended to cheat Creamer by skimming a part of the purchase price. But there is no testimony whatsoever to support the theory that Martin purchased the December 5 heroin from Creamer and then delivered it to the agents apart from Creamer's directions. Thus the instruction was properly refused. *United States* v. *Tritton,* 535 F.2d 359, 361 (7th Cir. 1976).[3]

The Jury's Consideration of Equivocal Inculpatory Statements

Defendant also argues that the equivocal nature of the admissions he made after arrest do not warrant the admissions instruction given the jury,[4] claiming an undue

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[3] Moreover, the independent contractor theory was factually inconsistent with defendant's main theory of innocence and attack on Martin's credibility. This is apparent from the lack of cross-examination of Martin on the relationship between himself and Creamer concerning the heroin purchases and defense counsel's total failure to argue this theory to the jury.

[4] The trial judge charged the jury as follows:

> "Evidence has been introduced that defendant allegedly made certain admissions relating to the crime charged in the indictment. The jury must weigh such alleged admissions with caution, and scrutinize the circumstances surrounding them to determine whether they were made and, if so, were made freely and voluntarily. If the jury finds that such admissions were made freely and voluntarily by the defendant with knowledge of the nature of such admissions, and without fear or coercion, either physical or psychological, or promise of reward, the jury may consider them together with all the other evidence in determining the innocence or guilt of the defendant. However, if the jury finds that the admissions were not made or, if made, were not made freely and voluntarily by the defendant, the jury should disregard them entirely." (Tr. 486)

emphasis on a "miniscule" segment of the trial testimony. Whether the equivocal statements were incriminating was a jury question. *United States* v. *Jakalski,* 267 F.2d 609, 612 (7th Cir. 1959), certiorari denied, 362 U.S. 936. Since there is some evidence of an admission, the standard admission instruction was proper, and no special definition of "admissions" was required to supplement the jury's common sense. *United States* v. *Meyer,* 359 F.2d 837, 839 (7th Cir. 1966), certiorari denied, 385 U.S. 837. Moreover, the admission instruction was placed in proper perspective by the trial judge's quoted charge to the jury.

Still Creamer argues that, in effect, the jury was permitted to consider his assertion of his right to remain silent as substantive evidence of defendant's guilt which, if true, would run afoul of the Fifth Amendment. *Doyle* v. *Ohio,* 426 U.S. 610. But defendant's argument has no support in the record. The jury only heard that the defendant was given *Miranda* warnings and that he made one arguably incriminating statement, followed shortly thereafter by a denial of the utterance and a general profession of innocence (Tr. 288-295). These statements do not amount to informing the jury of Creamer's decision to remain silent.

The Prosecutor's Bolstering of Martin's Credibility

The central thrust of the defense was that Martin was not worthy of belief and that the Government could not have made out even a *prima facie* case against Creamer on any count without him. From the facts recited above, it is clear that the extensive surveillance and the overwhelming circumstantial evidence could support the conviction without Martin's direct testimony. Creamer does not quarrel with the proposition that credibility determinations are for

the jury.[5] Rather, he does argue that Martin's credibility was impermissibly bolstered by the Government.

In essence, defendant argues that government counsel vouched for Martin by asking Martin certain questions about his understanding of his plea agreement and by commenting in rebuttal argument on Martin's testifying. A prosecutor may neither inject his personal opinion on credibility into the proceedings, nor should the jury be led to believe that the prosecutor has other information not presented at trial which leads him to believe the witness is telling the truth. *Lawn* v. *United States,* 355 U.S. 339, 359-360 n. 15. But here there was no overt statement of personal belief and no insinuation that the prosecutor knew better than the jury what the truth was. Rather the exchanges were engaged in to establish the pressures under

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[5] Creamer's counsel's cross-examination provided ample material to impeach Martin:

> "On cross-examination, Martin admitted he told the agents he had a nephew from whom he could get heroin. He also had narcotic transactions with Americo Scala, a partner of his in a furniture store. He also bought and sold marijuana, and offered to sell large quantities of amphetamines to the agents. Although he denied that he told the agents that if he was out of town his 22 year old son would handle his narcotic business, the agents testified he did so tell them. He had another supplier of heroin, one Pat Brophy. He would lie to his probation officer and falsify probation reports. He was a three-time loser and was not going to the joint for anybody; and he would do anything to stay out of the penitentiary." (D Br. 5; record citations omitted).

Moreover, Creamer did have some legitimate transactions with Martin. Creamer bought a leather jacket from Martin at a flea market and Creamer took Martin to a candy wholesaler, both in the area where the narcotics transactions occurred. Nevertheless, the jury apparently decided that the thrust of Martin's testimony was credible.

which Martin testified by putting Martin's understanding of his plea agreement, and what would happen if he breached his end of the bargain, before the jury. By calling a witness who testifies pursuant to an agreement requiring him to testify truthfully, the Government does not insinuate possession of information not heard by the jury and the prosecutor cannot be taken as having expressed his personal opinion on a witness' veracity. *United States* v. *Isaacs,* 493 F.2d 1124, 1165 (7th Cir. 1974), certiorari denied, 417 U.S. 976; *United States* v. *Aloi,* 511 F.2d 585, 598 (2d Cir. 1975), certiorari denied, 423 U.S. 1015.

Finally, Creamer argues that a misstatement of fact by the prosecutor in closing argument requires a new trial. In the trial's closing argument, the prosecutor stated that if defense counsel was so concerned about what happened between Martin and Creamer, counsel should have asked Martin on cross-examination what was said between Martin and Creamer at their meeting at the YMCA. In fact, there was no evidence of any conversation between Martin and Creamer at the YMCA. Upon objection the court stated that the jury would recall the evidence.[6] (Tr. 469) Creamer

[6] Creamer maintains that the court should have corrected the erroneous statement of the prosecutor. The Government fairly characterizes the context of the interchange as follows (Gov't Br. at 15 n. 24):

> "The prosecutor misstated the evidence when he spoke of a conversation inside the 'Y.' Defense counsel objected, asserting Martin never testified he *saw or* talked to Creamer inside the 'Y.' The record however, reflects that Martin testified he met Creamer in the 'Y' on the day of the second two ounce sale. (Tr. 109). Furthermore, Agent Johnson testified he saw Creamer near the locker room area at the time of the 18½ ounce sale. (Tr. 47). The prosecutor, in response to defense counsel's misstatement stated that there was testimony to support him."

To require the trial judge to resolve for the jury what the evidence actually was would have been more confusing than illuminating.

cites two recent Seventh Circuit opinions which reversed convictions where the prosecutor went outside the record in his argument. But in both *United States* v. *Fearns,* 501 F.2d 486 (7th Cir. 1974), and *United States* v. *Davis,* 532 F.2d 22 (7th Cir. 1976), the prosecutor was attempting to rehabilitate a government witness on a crucial aspect of the Government's case by detailing prior consistent statements made to the Government which were not in evidence before the jury.

Here whether or not Creamer spoke to Martin at the YMCA was not crucial to the Government's case. Moreover, defendant's objection, itself a misstatement (see note 6 *supra*), had a neutralizing effect on the jury. It must be remembered that " '[a]lmost every jury trial requires some compromise with standards of absolute perfection; such deviations must be tolerated if the jury system is to function effectively.' " *United States* v. *Jackson,* 542 F.2d 403, 410 (7th Cir. 1976). In light of the numerous meetings, contacts and conversations spread over the record between Creamer and Martin, the misstatement did not prejudice Creamer and was therefore harmless error.

For the reasons detailed above, the conviction of defendant Terrence Creamer is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 16, 1977.

Before
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 76-1480 vs.

TERRENCE CREAMER,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois,
Eastern Division.
No. 75-Cr-839
THOMAS R. MCMILLEN, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by appellant Terrence Creamer, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 16, 1977

Before
Hon. WALTER J. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 76-1480 vs.

TERRENCE CREAMER,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois,
Eastern Division.
No. 75-Cr-839

This matter comes before the Court on the "GOVERNMENT'S MOTION FOR PUBLICATION OF AN OPINION OF THE COURT OF APPEALS" filed herein on May 3, 1977 by counsel for the plaintiff-appellee and the "APPELLANT'S RESPONSE TO GOVERNMENT'S MOTION FOR PUBLICATION OF AN OPINION OF THE COURT OF AND REQUEST THAT SAID MOTION BE CONSIDERED IN SUPPORT OF APPELLANT'S SUGGESTION FOR REHEARING IN BANC" filed herein by counsel for the defendant-appellant on May 6, 1977. On consideration whereof,

IT IS ORDERED that said motion be, and the same is hereby, GRANTED.